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In the Supreme Court of the United States

OCTOBER TERM, 1975

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provision and statutes involved	2
Statement	3
Summary of argument	7
Argument:	
I. A taxpayer who fails to assert his privilege against self-incrimination at the time of filing his federal income tax return may not subsequently invoke that privilege as a bar to the use of his return in a criminal prosecution	11
A. Failure to assert the privilege at the time of filing precludes any subsequent invocation of the privilege at trial	12
1. Petitioner's voluntary disclosures were not compelled in the manner protected against by the Fifth Amendment	13
2. A rule conferring automatic use immunity on information supplied on tax returns would seriously impede enforcement of both tax and nontax laws	22

Argument—Continued
I. B. It is doubtful whether the privilege against self-incrimination may be asserted as a basis for refusing to answer the questions on a federal income tax return 27
II. Any error in the admission into evidence of petitioner's federal income tax returns was harmless 42
III. The other evidence introduced against petitioner was properly admitted 45
A. The admission into evidence of the telephone toll records did not violate Section 605 of the Communications Act 46
B. Racing charts of the California Horse Racing Board were properly admitted under the Business Records Act 49
Conclusion 51

CITATIONS

Cases:

Albertson v. *Subversive Activities Control Board*, 382 U.S. 70 ..... 37, 38, 40
Bram v. *United States*, 168 U.S. 532 30
Brandon v. *United States*, 382 F. 2d 607 48
Brown v. *United States*, 359 U.S. 41 46
Bubis v. *United States*, 384 F. 2d 643 48
California v. *Byers*, 402 U.S. 424 ..... 9, 28, 29, 32, 33, 34, 35, 40, 41
Chapman v. *California*, 386 U.S. 18 43
Couch v. *United States*, 409 U.S. 322 16
Counselman v. *Hitchcock*, 142 U.S. 547 ..... 24, 26, 30
Di Piazza v. *United States*, 415 F. 2d 99 48
Dutton v. *Evans*, 400 U.S. 74 ..... 11, 50

Cases—Continued

Garrity v. *New Jersey*, 385 U.S. 493 ..... 16, 17, 18
Grimes v. *United States*, 379 F. 2d 791, certiorari denied, 389 U.S. 846 13
Grosso v. *United States*, 390 U.S. 62 ..... 21, 37, 38
Hanley v. *United States*, 416 F. 2d 1160, certiorari denied, 397 U.S. 910 50
Haynes v. *United States*, 390 U.S. 85 ..... 37, 38
Hoffman v. *United States*, 341 U.S. 479 ..... 9, 30, 31, 32, 33, 34, 36, 39, 42
Howat v. *Kansas*, 258 U.S. 181 20
Interstate Commerce Commission v. *Brimson*, 154 U.S. 447 31
Kastigar v. *United States*, 406 U.S. 441 ..... 24, 26
Kerner v. *United States*, 493 F. 2d 1124, certiorari denied, 417 U.S. 976 25
Lefkowitz v. *Turley*, 414 U.S. 70 ..... 16, 17, 18
Mackey v. *United States*, 401 U.S. 667 ..... 11, 21
Maness v. *Meyers*, 419 U.S. 449 ..... 7, 13, 19
Marchetti v. *United States*, 390 U.S. 39 ..... 9, 21, 37, 38, 39, 40
McCarthy v. *Arndstein*, 266 U.S. 34 30
Michigan v. *Tucker*, 417 U.S. 433 16
Miranda v. *Arizona*, 384 U.S. 436 ..... 16, 17
Mishkin v. *New York*, 383 U.S. 502 46
Nolan v. *United States*, 423 F. 2d 1031 48
Pauldino v. *United States*, 500 F. 2d 1369 12
Quinn v. *United States*, 349 U.S. 155 30
Rogers v. *United States*, 340 U.S. 367 14
Shushan v. *United States*, 117 F. 2d 110, certiorari denied, 313 U.S. 574 ..... 13, 15
Stillman v. *United States*, 177 F. 2d 607 13
United States v. *Bisceglia*, 420 U.S. 141 33
United States v. *Bishop*, 412 U.S. 346 20
United States v. *Covello*, 410 F. 2d 536, certiorari denied, 396 U.S. 879 ..... 47, 49

Cases—Continued

	Page
United States v. *Daly*, 481 F. 2d 28, certiorari denied, 414 U.S. 1064	20
United States v. *Freed*, 401 U.S. 601	23
United States v. *Gallo*, 123 F. 2d 229	48
United States v. *Haili*, 443 F. 2d 1295	50
United States v. *Knox*, 396 U.S. 77	21
United States v. *Kordel*, 397 U.S. 1	7, 14, 16
United States v. *Lookretis*, 398 F. 2d 64	21
United States v. *Mandujano*, No. 74–754, certiorari granted, March 24, 1975	14
United States v. *Miller*, No. 74–1179, certiorari granted, June 9, 1975	46
United States v. *Monia*, 317 U.S. 424	7, 14, 15
United States v. *Murdock*, 284 U.S. 141	14
United States v. *Porth*, 426 F. 2d 519, certiorari denied, 400 U.S. 824	20
United States v. *Silverman*, 449 F. 2d 1341, certiorari denied, 405 U.S. 918	13
United States v. *Smith*, 484 F. 2d 8, certiorari denied 415, U.S. 978	13
United States v. *Stevens*, 510 F. 2d 1101	47
United States v. *Sullivan*, 274 U.S. 259	9, 12, 34, 38
United States v. *United States Coin & Currency*, 401 U.S. 715	22
Uphaus v. *Wyman*, 360 U.S. 72	20
Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103	14
Worden v. *Searls*, 121 U.S. 14	20
Constitution, statutes and regulations:	
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*:	
Section 220	47
Section 605	3, 10, 44, 45, 46
Constitution of the United States, Fifth Amendment	*passim*

Constitution, statutes and regulations—Continued

	Page
Business Records Act:	
28 U.S.C. 1732	3, 45, 48
28 U.S.C. 1732(a)	49, 50
Internal Revenue Code of 1954 (26 U.S.C.):	
Section 6011	2
Section 6012 (Supp. III)	3
Section 6020(b)	18
Section 7203	19, 20
Section 7602(2)	19
Section 7604	19
18 U.S.C. 224	4
18 U.S.C. 371	3–4, 41
18 U.S.C. 1084	4, 32, 42
18 U.S.C. 1952	4
18 U.S.C. 4208(a)(2)	6
18 U.S.C. 6004	19, 42
Federal Rules of Criminal Procedure, Rule 17(a)	46
Treasury Regulations on Procedure and Administration:	
26 C.F.R. 301.6103(a)	36
26 C.F.R. 301.6103(a)–1(g)	25
Miscellaneous:	
Bittker, *Taxing Income From Unlawful Activities*, 25 Case-West. Res.L. Rev. 130 (1974)	25
Department of Commerce, *Statistical Abstract of the United States, 1974*	33
Grey, *Do We Have An Unwritten Constitution?* 27 Stan. L. Rev. 703 (1975)	32
Note, 85 Harv. L. Rev. 269 (1971)	31
Note, 86 Harv. L. Rev. 914 (1973)	11, 26
V Wigmore, *Evidence* (Chadbrown rev. 1974)	51

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OPINIONS BELOW

The panel and *en banc* opinions of the court of appeals (Br. in Opp. App; Pet. App. A) are reported at 501 F. 2d 228 and 236.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on April 11, 1974. A timely petition for rehearing was denied on June 11, 1974. On July 10, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and until August 9, 1974, and the petition was filed on the latter date. The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a taxpayer who fails to assert his privilege against self-incrimination at the time of filing his federal income tax return may subsequently invoke that privilege as a bar to the use of his return in a criminal prosecution.

2. Whether any error in the admission into evidence of petitioner's federal income tax returns was harmless.

3. Whether the other evidence introduced against petitioner was properly admitted.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Sections 6011 and 6012 of the Internal Revenue Code of 1954, 26 U.S.C. 6011 and 6012, provide in pertinent part:

> Section 6011(a). When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.
>
> * * * * *

> Section 6012(a). Returns with respect to income taxes * * * shall be made by * * * [e]very individual having for the taxable year a gross income of $750 or more * * *. [Supp. III.]

Section 605 of the Communications Act of 1934, 48 Stat. 1103, as amended, 47 U.S.C. 605, provides in pertinent part:

> * * * [N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except * * * (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority.

The Business Records Act, 28 U.S.C. 1732, provides in pertinent part:

> In any court of the United States * * *, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

STATEMENT

Petitioner was indicted in the Central District of California for conspiring, in violation of 18 U.S.C.

588-588—75——2

371, to violate 18 U.S.C. 224 (bribery in sporting contests), 1084 (interstate transmission of bets or wagers), and 1952 (use of an interstate facility to distribute proceeds of unlawful activity) and for aiding and abetting the interstate transmission of bets or wagers, in violation of 18 U.S.C. 1084. At his first trial, petitioner was convicted on the conspiracy charge, but the jury was unable to reach a verdict on the substantive offense.[1] Petitioner's conviction was set aside on the ground that the prosecutor had improperly commented on petitioner's failure to testify. Petitioner was then retried, again before a jury. The issues before this Court concern the correctness of the district court's rulings on the admissibility of evidence in the second trial.

The conspiracy count of the indictment charged that petitioner, Clarence Swank, William Lawler, and others conspired to violate federal gambling laws. The object of the conspiracy, as charged in the indictment (C.R. 183),[2] was as follows:

> [D]efendants and their unindicted co-conspirators would arrange to fix horse races, by means of bribery, injecting stimulants in horses, and other means, and would secure information regarding particular horses and jockeys from sources unavailable to the general public. Based upon these arrangements and this information,

[1] At that trial, petitioner's co-defendant Clarence Swank was convicted both of conspiracy and of interstate transmission of wagers; his co-defendant Wayne Donaway was convicted of interstate transmission of wagers and of the use of interstate facilities to distribute proceeds of unlawful activity.

[2] "C.R." refers to the two-volume clerk's record of pleadings.

> defendants would attempt to place and [would] place wagers on particular horses. In order to maintain high pari-mutuel odds, and in order to avoid others not [a] party to the conspiracy placing wagers on the same horses, wagers were placed with bookmakers, away from the track, shortly before [the] starting time of the race in which the particular horse was running.

Co-conspirators Swank and Lawler testified as to petitioner's role in the conspiracy, which was to furnish them with the information necessary for the placing of bets. The government introduced telephone toll records that revealed in detail the workings of the betting arrangements,[3] but the indictment did not charge, and the government did not attempt to prove, that petitioner himself had placed any wagers in furtherance of the conspiracy.

The district court also admitted into evidence petitioner's federal income tax returns for the years 1965, 1966, and 1967, over petitioner's objection that nontax prosecutorial use of the returns would violate his privilege against self-incrimination. The returns showed that petitioner had reported "gambling" or "wagering" as his major source of income: on his 1965 return, petitioner had listed his occupation as "professional gambler" and declared $8,022 as miscellaneous income derived from "gambling"; on his 1966 return, petitioner had declared $22,000 as "wagering" income; and on his 1967 return, he had declared $25,400 as "wagering" income (see C.R. 67). Peti-

[3] Petitioner objected to the introduction of the telephone toll records. See pp. 45–48, *infra*.

tioner had not claimed the privilege against self-incrimination on his returns or at the times they were filed.

At the close of the government's case, the trial judge acquitted petitioner of the substantive offense of aiding and abetting the interstate transmission of bets or wagers. Petitioner was then convicted on the conspiracy count. He was sentenced to two years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2).[4]

A panel of the court of appeals reversed, with one judge dissenting (Br. in Opp. App.). The government's petition for a rehearing *en banc* was granted,[5] and the full court affirmed the conviction, with five judges dissenting (Pet. App. A). The majority reasoned that although the privilege against self-incrimination might have entitled petitioner to refuse

[4] Petitioner was released on bond pending appeal. Bond was revoked after petitioner was found in possession of a suitcase containing paraphernalia and drugs of a type used to stimulate and depress race horses. The court of appeals affirmed the bond revocation, and this Court denied certiorari to review that action, 416 U.S. 935, after the government indicated that it would not move for petitioner's confinement unless and until the court *en banc* affirmed the conviction. Although the conviction has now been affirmed, the government so far has not sought petitioner's confinement, and he remains free on bond.

[5] On September 11, 1972, an order was filed denying the government's petition for rehearing and rejecting the suggestion for rehearing *en banc*, stating that no judge had requested a vote. In fact, however, one judge had requested a vote. When this error was called to the clerk's attention, the mandate was withheld pending the vote, and on December 13, 1972, the court granted rehearing *en banc*. Petitioner applied to this Court for a writ of mandamus or prohibition to prevent the rehearing, but tne application was denied. 411 U.S. 963.

to answer certain questions on the federal income tax return forms, the privilege did not operate in a self-executing manner to confer use immunity upon the answers that petitioner had not refused to furnish. The dissenters took the position that effectuation of the privilege, whether or not asserted at the time the return was filed, requires imposition of a restriction against the use of the return in any criminal prosecution of the taxpayer for a nontax offense.

SUMMARY OF ARGUMENT

I

A. A taxpayer who fails to assert his privilege against self-incrimination at the time he files his federal income tax return may not subsequently invoke that privilege as a bar to the use of that return in a criminal prosecution. The Fifth Amendment privilege "is not a self-executing mechanism; it can be * * * lost by not asserting it in a timely fashion." *Maness* v. *Meyers,* 419 U.S. 449, 466.

The preparation and filing of an income tax return may be analogized to the giving of testimony in a civil proceeding. It is clear that when such testimony is given without a contemporaneous claim of privilege, it has not been "compelled" in the manner protected against by the Fifth Amendment and therefore may be used against the witness in a subsequent criminal prosecution. See, *e.g., United States* v. *Kordel,* 397 U.S. 1, 10; *United States* v. *Monia,* 317 U.S. 424, 427. A taxpayer, when completing and filing his return, is subject to no greater testimonial compulsion than that

experienced by a witness in an ordinary civil proceeding; indeed, the sanctions to which a taxpayer may be subjected on account of his assertion of the Fifth Amendment privilege as a reason for refusing to answer a question on a return are both less immediate and less severe than those that may be visited upon a recalcitrant witness.

Since the Fifth Amendment confers an immunity from prosecutorial use only upon disclosures made as a result of testimonial compulsion, a taxpayer is not constitutionally entitled to use immunity merely by virtue of the filing of his federal income tax return. This conclusion is supported by the practical necessities of tax administration and criminal law enforcement. If all disclosures made on federal income tax returns, and their fruits, were automatically immune from nontax prosecutorial use, special procedures would have to be devised to insulate tax from nontax investigations and prosecutions, and evidence of nontax criminal activities uncovered in the course of tax investigations might be presumptively immune from prosecutorial use. Use immunity with respect to federal income tax returns should be limited to only a few situations determinable by the government in advance, so that other taxpayers' returns may, as at present, be made available to the Department of Justice or a United States Attorney in proper cases in connection with criminal tax or related nontax investigations.

B. It is, moreover, doubtful whether the requirement that the questions on an income tax return be

answered implicates a taxpayer's Fifth Amendment privilege at all. This Court's decision in *California* v. *Byers,* 402 U.S. 424, suggests that a taxpayer's privilege against self-incrimination may not be available as a basis for refusing to answer the questions on a return.

The standard of incrimination necessary to justify invocation of the privilege against self-incrimination in the criminal context is whether the claimant's response "would furnish a link in the chain of evidence needed to prosecute the claimant for a * * * crime." *Hoffman* v. *United States,* 341 U.S. 479, 486. But in weighing claims of Fifth Amendment privilege, this Court has required a higher showing of incrimination in certain cases arising outside the criminal context, in which the requested disclosure would have served an important nonprosecutorial government interest. See, *e.g., United States* v. *Sullivan,* 274 U.S. 259.

The government has an overriding interest in effective enforcement of its income tax laws, and compelled self-reporting is a necessary part of the enforcement scheme. Moreover, the questions asked on the return are essentially neutral and are addressed to the public at large, rather than to a narrow class of persons engaged in illegal activities, thus contrasting sharply with the reporting schemes struck down in cases such as *Marchetti* v. *United States,* 390 U.S. 39. These considerations point toward the conclusion that a claim of privilege with respect to a federal income tax return should be honored, if at all, only when the disclosures sought would entail a substantial risk of

prosecution. And the disclosures made by petitioner, that he was a professional gambler who derived a substantial income from wagering, entailed no such risk.

II

Any error in the admission into evidence of petitioner's federal income tax returns was harmless beyond a reasonable doubt. Those returns showed only that petitioner was "no stranger to the business of wagering and gambling" (App. 58–59). But petitioner's gambling tendencies were irrelevant to his part in the charged conspiracy; the indictment charged not that petitioner himself placed bets in furtherance of the conspiracy but rather that he supplied his co-conspirators with the information necessary to facilitate their wagering activities. Furthermore, petitioner's gambling tendencies were in any event amply established by other evidence.

III

A. Section 605 of the Communications Act does not bar admission into evidence of telephone toll records produced pursuant to a valid grand jury subpoena. That provision explicitly permits divulgence of communications "in response to a subpoena * * *." Indeed, even apart from the explicit statutory exception, it seems clear that divulgence of toll records as such is not barred by the statute at all.

B. The racing charts kept by the California Horse Racing Board were admissible under the Business Records Act. Those charts were made by an agent of

the Board in the regular course of the Board's business, and petitioner offered no evidence that the charts were unreliable. The Act is not unconstitutional merely because it provides an exception to the hearsay rule. Cf. *Dutton* v. *Evans,* 400 U.S. 74.

ARGUMENT

I

A TAXPAYER WHO FAILS TO ASSERT HIS PRIVILEGE AGAINST SELF-INCRIMINATION AT THE TIME OF FILING HIS FEDERAL INCOME TAX RETURN MAY NOT SUBSEQUENTLY INVOKE THAT PRIVILEGE AS A BAR TO THE USE OF HIS RETURN IN A CRIMINAL PROSECUTION

The principal issue in this case is whether petitioner's federal income tax returns for the years 1965, 1966, and 1967 were admissible against him in this prosecution for conspiring to violate federal gambling laws.[6] In considering this issue, both the majority and the dissenters in the court of appeals *en banc* took as their starting point the assumption that the requirement, imposed by Sections 6011(a) and 6012(a) of the Internal Revenue Code of 1954, 26 U.S.C. 6011(a) and 6012(a), that a taxpayer answer the questions on a federal income tax return implicates the privilege against self-incrimination in the same manner and to the same extent as does, for example, the require-

[6] Neither petitioner nor the minority in the court of appeals *en banc* has suggested that a taxpayer would be entitled to immunity from use of his returns in a criminal tax prosecution. See *Mackey* v. *United States,* 401 U.S. 667, 703–711 (concurring opinion of Mr. Justice Brennan); Note, 86 Harv. L. Rev. 914 915, n. 7 (1973).

ment that a witness furnish responsive testimony at a civil trial. We discuss the soundness of that assumption below (pp. 27–41, *infra*). But for purposes of our main argument (pp. 12–27, *infra*), we assume with the court of appeals that petitioner's privilege against self-incrimination was implicated by the requirement that he answer the questions on his returns and that he would have been entitled, at the times the returns were filed, to assert the privilege as a basis for refusing to make any incriminating disclosures.[7]

A. FAILURE TO ASSERT THE PRIVILEGE AT THE TIME OF FILING PRECLUDES ANY SUBSEQUENT INVOCATION OF THE PRIVILEGE AT TRIAL

Our contention here is that the filing by petitioner of fully completed returns, without any assertion of the privilege at the time of filing, precluded any subsequent claim of immunity with respect to the disclosures actually made on the returns. This is the rule that has been applied by all courts of appeals that have considered the question. See *Pauldino* v.

[7] But we make that assumption only with respect to the questions relating to petitioner's occupation and the source of his income. The amount of petitioner's income, whatever its source, was not privileged from disclosure. As Mr. Justice Holmes stated for the Court in *United States* v. *Sullivan*, 274 U.S. 259, 263–264:

> It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime.

Subsequent decisions of this Court have reaffirmed that a taxpayer has no right to refuse to disclose to the revenue authorities the amount of his illegal gains. *James* v. *United States*, 366 U.S. 213; *Rutkin* v. *United States*, 343 U.S. 130.

United States, 500 F. 2d 1369 (C.A. 10); *Grimes* v. *United States*, 379 F. 2d 791 (C.A. 5), certiorari denied, 389 U.S. 846; *Stillman* v. *United States*, 177 F. 2d 607 (C.A. 9); *Shushan* v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574. Cf. *United States* v. *Smith*, 484 F. 2d 8 (C.A. 10), certiorari denied, 415 U.S. 978; *United States* v. *Silverman*, 449 F. 2d 1341 (C.A. 2), certiorari denied, 405 U.S. 918. This rule simply constitutes a specific application of the more general principle that the privilege against self-incrimination "is not a self-executing mechanism; it can be * * * lost by not asserting it in a timely fashion." *Maness* v. *Meyers*, 419 U.S. 449, 466.

1. *Petitioner's voluntary disclosures were not compelled in the manner protected against by the Fifth Amendment.*

The court below properly analogized the preparation and filing of an income tax return to the giving of testimony in a civil proceeding (Pet. App. A, p. 5):

> Assume [petitioner] had witnessed an automobile accident in the parking lot of Pomona Fairgrounds on September 25, 1968. If he had been subpoenaed as a witness in a civil trial concerning the accident and had testified that he was there and saw everything, those admissions could have been used in his conspiracy trial to prove that he was at the race track on the day when the first race was allegedly fixed. His privilege would be unavailable because he had failed to assert it during the civil trial. At the civil trial, he was subpoenaed to testify by the power of the court; and he could have been

> awed by the direction of the judge to answer the questions. But if he failed to assert his privilege and proceeded to testify, his answers could be used against him. His failure to invoke his privilege in his tax returns produces a similar result.

a. The court of appeals' premise—that, at least as a general matter, testimony given in a civil proceeding may be used against the witness in a subsequent criminal prosecution—is supported by a long line of decisions in this Court. See, *e.g., United States* v. *Kordel,* 397 U.S. 1, 10; *Vajtauer* v. *Comissioner of Immigration,* 273 U.S. 103, 113. A similar rule also applies to testimony given before a grand jury (see, *e.g., Rogers* v. *United States,* 340 U.S. 367; *United States* v. *Monia,* 317 U.S. 424, 427)[8] and to information supplied in response to an administrative summons (see *e.g., United States* v. *Murdock,* 284 U.S. 141, 148).

Some of the earlier decisions articulating and applying this rule explain it as being grounded in a theory of implied waiver. See, *e.g., United States* v. *Murdock, supra,* 284 U.S. at 148 (the witness's privilege "is deemed waived unless invoked"). But later decisions have correctly pointed out that a witness's previous testimony in a civil proceeding or before a grand jury is admissible against him in a subsequent prosecution because that testimony was not "compelled" in a manner protected against by the Fifth Amend-

[8] But see *United States* v. *Mandujano,* No. 74-754, writ of certiorari granted March 24, 1975 (involving the testimony of "putative defendants" before a grand jury).

ment. Thus in *United States* v. *Monia, supra,* 317 U.S. at 427, the Court observed:

> The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment.[9]

The requirement of express assertion of the privilege pertains even though a witness in a civil proceeding or before a grand jury is ordinarily subject to some compulsion to testify: he often will have been summoned by legal process to appear and give testimony; he takes an oath that he will tell the "whole truth"; and the judge may inform him, if necessary, that he has a duty as a citizen to provide evidence and may not refuse to do so on mere whim. But the mild coercion to which any witness is thereby subjected does not, under the decisions of this Court, constitute a basis for subsequent "retroactive" invocation of the Fifth Amendment privilege. "The duty to tell the facts when called as a witness, and to tell them truly under the compulsion of an oath does not constitute what is said a forced admission when no reluctance is made known." *Shushan* v. *United States, supra,* 117 F. 2d at 117.

Accordingly, more recent cases involving the question whether a particular witness's testimony may be

[9] The argument by the dissenters below (Pet. App. A, pp. 42-43) that petitioner cannot be deemed to have "waived" his privilege is therefore inapposite.

used against him in a subsequent criminal prosecution have focused upon whether the witness, when testifying, was subject to some more compelling form of testimonial coercion. Where such coercion has been found, the Court has concluded that the testimony thus compelled, even though given without any contemporaneous claim of privilege, is immune from subsequent prosecutorial use against the witness. See *Lefkowitz* v. *Turley,* 414 U.S. 70 (loss of government contracts); *Garrity* v. *New Jersey,* 385 U.S. 493 (loss of government employment). On the other hand, in the absence of some special or unusual compulsion to speak, the prosecution's right to utilize a defendant's previous statement will be recognized. See *United States* v. *Kordel, supra.* Cf. *Michigan* v. *Tucker,* 417 U.S. 433; *Couch* v. *United States,* 409 U.S. 322.

b. The instances are sharply limited in which an individual may be excused from the requirement that he claim his privilege in order to avoid subsequent characterization of his disclosures as uncompelled. They appear to be confined to two basic categories, and a taxpayer completing his federal income tax return clearly does not come within either of them.[10] The first category consists of persons in police custody who make statements during incommunicado interrogation without advice and waiver of rights. See *Miranda* v. *Arizona,* 384 U.S. 436. Even though such individuals have not affirmatively asserted any claim

[10] We discuss below (pp. 20–22, *infra*) a third, very narrow, category of cases in which use immunity may attach to disclosures made without any contemporaneous assertion of the privilege.

of privilege, they can preclude use of their statements in the prosecution's direct case if *Miranda*'s prophylactic requirements have not been observed. But even a brief glimpse at the *Miranda* opinion reveals how different the situation of a taxpayer filling out his income tax return in the privacy of his own home or office is from the circumstances that so concerned the Court in the case of incommunicado police interrogation. The latter situation was found by the Court to entail substantial risks of resort by police to "third degree" tactics or other means to "persuade, trick, or cajole [a suspect] out of exercising his constitutional rights" (384 U.S. at 455), with the conduct of the police often not effectively subject to judicial scrutiny because of the incommunicado nature of the interrogation.

The second category consists of persons like those questioned in *Turley* or *Garrity,* who have been called to testify in proceedings inquiring into suspected illegal activities. The salient feature of these cases is that the individuals involved have been directly and explicitly threatened with substantial punitive action in response to any invocation of the privilege or refusal to waive immunity from prosecutive use of their testimony. Nothing remotely similar confronts a taxpayer completing his federal income tax return.

A taxpayer is not subjected to any undue pressures designed to coerce him to forego a valid claim of privilege. Unlike the circumstances in either *Miranda* or *Garrity,* for example, a taxpayer is not confronted with significant physical or psychological coercion to

provide self-incriminatory information. To the contrary, as we now show, the taxpayer, at the time of completing and filing his return, is in a situation that is inherently less coercive even than that of a witness who has been called to testify in a civil proceeding.

c. This Court's decision in *Miranda* focused in large part upon the perceived coerciveness of the setting in which the self-incriminating disclosures were made. But as we have already indicated (p. 16, *supra*), that kind of coerciveness is absent here. In *Turley* and *Garrity* the Court was concerned with a different kind of coercion—the official imposition of some form of penalty or sanction for the assertion even of a valid claim of privilege. That kind of coercion also is lacking here. A taxpayer is faced with no threat, express or implied, of a penalty for asserting a claim of privilege. And, as we now explain, the mechanics that would be brought into play upon a taxpayer's assertion of a claim of privilege closely resemble those that operate in the context of a civil trial and are not themselves improperly coercive.

If a taxpayer asserts his privilege against self-incrimination as a basis for refusing to answer a question on his return, the Internal Revenue Service may proceed in either or both of two ways. First, the Service may proceed administratively to complete the taxpayer's return. See Section 6020(b) of the Internal Revenue Code. In connection with the preparation of the taxpayer's return, the Service is empowered to summon the taxpayer "to appear before the Secretary or his delegate at a time and place named in the sum-

mons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such ~~inquiry~~ * * * inquiry Section 7602(2) of the Code. If the taxpayer refuses to comply with the summons, the Service may sue for enforcement.[11] See Section 7604 of the Code. If the judge sitting on the summons enforcement proceeding upholds the taxpayer's claim of privilege and therefore refuses to enforce the summons, the taxpayer is in the same protected position as the witness who is excused from testifying on grounds of privilege. If the judge denies the claim of privilege and orders the summons enforced, the taxpayer may appeal from that order. Only if a stay pending appeal is denied does the taxpayer stand in the disadvantageous position of a witness whose claim of privilege has been denied, *i.e.*, of being forced to choose between, on the one hand, making the requested disclosures and, on the other, asserting his claim of privilege on appeal as a defense against an order holding him in contempt.[12]

Second, the Internal Revenue Service may seek to have the taxpayer criminally prosecuted for willful failure to file a return, in violation of Section 7203 of the Code. But the willfulness requirement of Sec-

[11] While this has not ordinarily been the practice, 18 U.S.C. 6004 apparently empowers the Service, with the approval of the Attorney General, to grant use immunity to the taxpayer and thereupon compel a response.

[12] A disclosure made under such circumstances might be protected by constructive use immunity against later use in a criminal prosecution. See *Maness* v. *Meyers*, *supra*, 419 U.S. at 474 (concurring opinion of Mr. Justice White).

tion 7203 imposes upon the government the burden of proving that the taxpayer committed "a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop,* 412 U.S. 346, 360. Accordingly, a prosecution of a taxpayer under Section 7203, for a failure to answer questions on his return relating to his occupation or the source of his income (see note 7, *supra*), can succeed only where the government establishes beyond a reasonable doubt not merely that the taxpayer's claim of privilege was unfounded in law but also that it was made in bad faith. See, *e.g., United States* v. *Porth,* 426 F. 2d 519, 523 (C.A. 10), certiorari denied, 400 U.S. 824 (taxpayer's refusal to complete his return "grew out of his long-time dislike for the taxing and money systems of the United States"); *United States* v. *Daly,* 481 F. 2d 28, 30 (C.A. 8), certiorari denied, 414 U.S. 1064 (taxpayer "made no reasonable showing with respect to how the disclosure * * * could possibly incriminate him"). Thus a taxpayer who erroneously but in good faith relies upon his privilege as a basis for refusing to answer such questions is not subject to conviction under Section 7203. In contrast, a witness who erroneously but in good faith refuses to testify on grounds of privilege may be imprisoned for contempt. See, *e.g., Uphaus* v. *Wyman,* 360 U.S. 72. Cf. *Howat* v. *Kansas,* 258 U.S. 181; *Worden* v. *Searls,* 121 U.S. 14.

In short, the sanctions to which a taxpayer may be subjected on account of the assertion of the Fifth Amendment privilege as a reason for refusing to answer a question on his return are both less immediate

and less severe than those that may be visited upon a recalcitrant witness. Accordingly, a taxpayer, at the time of preparing and filing his income tax return, is not subject to testimonial coercion amounting to compulsion under the Fifth Amendment. There is, therefore, no constitutional basis for barring prosecutorial use of the disclosures made on a taxpayer's return.

d. Unlike the minority below (Pet. App. A, pp. 15–17, 42), we do not believe that this Court's decision in *Mackey* v. *United States, supra,* requires a different result. Indeed, the holding in *Mackey*—that a defendant's previous gambling excise tax returns were admissible against him in a trial for income tax evasion—is fully consistent with our contention here. Cf. *United States* v. *Knox,* 396 U.S. 77. It is true that a majority of the Court indicated that a different rule would apply to criminal trials that took place after the date of the decisions in *Marchetti* v. *United States,* 390 U.S. 39[illegible], and *Grosso* v. *United States,* 390 U.S. 62, *i.e.,* that disclosures made in compliance with the registration and excise tax reporting requirements at issue in those cases would be immune from prosecutorial use from and after the date of their decisions. 401 U.S. at 672 (plurality opinion of Mr. Justice White), 710–711 (concurring opinion of Mr. Justice Brennan), and 713–714 (dissenting opinion of Mr. Justice Douglas). See also *United States* v. *Lookretis,* 398 F. 2d 64 (C.A. 7). But we believe that the rule thereby made applicable to the disclosure produced by those regis-

tration and excise tax requirements—a rule that has no exact counterpart with respect to testimony elicited in civil or regulatory proceedings or given before grand juries—stems from the unusual fact that those requirements, because directed at individuals inherently suspect of criminal activities and designed to elicit disclosures concerning those individuals' activities in an area permeated by criminal statutes, imposed such substantial risks of self-incrimination that the entire statutory scheme was held "to be unenforceable." 401 U.S. at 672 (plurality opinion of Mr. Justice White). In view of that fact, it would have been anomalous to have permitted the government to give force to the scheme through prosecutorial use of the disclosures it had produced. Cf. *United States* v. *United States Coin & Currency,* 401 U.S. 715. No similar anomaly would arise upon prosecutorial use of petitioner's disclosures here. The income tax statutes are concededly valid and enforceable, and there is no apparent reason why an incidentally incriminating disclosure voluntarily made on an income tax return should automatically be placed beyond legitimate prosecutorial inquiries.

2. *A rule conferring automatic use immunity on information supplied on tax returns would seriously impede enforcement of both tax and non-tax laws.*

It is important that use immunity, if any, with respect to federal income tax returns be limited to a few situations or cases determinable by the government in advance, so that in all other cases returns may, as

at present, be made available to the Department of Justice and the United States Attorneys in proper cases in connection with criminal tax, and related nontax, investigations. A rule that confers use immunity upon every item on every taxpayer's return (*i.e.*, the rule for which petitioner contends here), would intolerably interfere both with effective criminal enforcement of the revenue laws and with legitimate prosecutorial inquiries into nontax offenses as well.[13]

In the usual criminal tax case, the Internal Revenue Service conducts the criminal tax investigation but then refers the matter to the Department of Justice or a United States Attorney for prosecution. This

[13] It is, we believe, fair to characterize petitioner and the dissent below as urging adoption of a doctrine of automatic use immunity. But recognition of an automatic use immunity would not be appropriate even if the approach we recommend, which requires the taxpayer to assert his privilege at the time of filing his return, were to be rejected. A compelled disclosure violates the privilege against self-incrimination only if the disclosure is incriminating at the time it is made. A taxpayer has no right to shield a disclosure that was innocent when made, merely because the disclosure later became incriminating in light of the taxpayer's subsequent criminal activities. The privilege against self-incrimination does not "suppl[y] insulation for a career of crime about to be launched." *United States* v. *Freed*, 401 U.S. 601, 607. Accordingly, even if a taxpayer is to be permitted to invoke the privilege for the first time at trial, he should be required to establish not only that the previous disclosure now has a potential for incrimination, but also that it had that potential when made. In this case, for example, petitioner would be required to show that the disclosures made on his 1965, 1966, and 1967 income tax returns were incriminating as of the dates on which those returns were filed and not merely that they became incriminating in the context of a prosecution for a conspiracy all overt acts of which occurred later, between May 1968 and April 1969 (C.R. 42–45).

process would become fraught with difficulty if the rule urged upon the Court by petitioner were to be adopted. If the taxpayer's return is received by the government subject to immunity from all nontax prosecutorial use, the referral of his case for prosecution would confront the prosecutor with a serious dilemma in those situations in which the taxpayer also is under investigation in connection with suspected nontax offenses. Obviously the prosecutor must at least review the case that the Internal Revenue Service has developed to determine whether it merits prosecution. But once he does that, he has incurred the heavy burden of proving, in any subsequent nontax prosecution of the taxpayer, that none of the government's evidence was derived from the taxpayer's return. See *Kastigar* v. *United States,* 406 U.S. 441; *Counselman* v. *Hitchcock,* 142 U.S. 547. Of course, procedures could be devised to attempt to insulate tax from nontax prosecutions. But they do not now exist, and they would inevitably be burdensome.

By the same token, under a rule of automatic use immunity, evidence of nontax criminal activities uncovered by the Service in the course of a tax investigation would be presumptively immune from prosecutorial use, whether or not the tax case itself were referred for prosecution, as a "fruit" of information provided on the return. As a corollary, prosecutors who discover evidence of tax offenses in the course of nontax investigations may be made reluctant to confer with revenue agents concerning the criminal tax implications of such evidence, if such contacts would subject their nontax prosecutions to charges of taint.

Furthermore, a rule of automatic use immunity would put an end to the coordination of tax and nontax investigations. At present the Department of Justice and United States Attorneys, by regulation, have the right to inspect a taxpayer's return "where necessary in the performance of * * * official duties." Section 301.6103(a)-1(g) of the Treasury Regulations on Procedure and Administration, 26 C.F.R. 301.6103(a)-1(g). This right is commonly exercised in the course of nontax criminal investigations of individuals suspected of participating in organized criminal activities and of public officials suspected of corruption. The purpose of the inspection ordinarily is to determine whether the taxpayer failed to report the income produced by the illegal transactions that were uncovered during the course of the nontax investigation, *i.e.,* whether the individual has committed tax as well as nontax offenses.[14] As a result of this procedure, nontax investigations into organized crime or official corruption frequently give rise to tax investigations and prosecutions as well. See, *e.g., Kerner* v. *United States,* 493 F. 2d 1124 (C.A. 7), certiorari denied, 417 U.S. 976. A rule of automatic use immunity would, as a practical matter, prevent a prosecutor from inspecting the tax returns of an

[14] Of course, the individual's return could corroborate the evidence of nontax offenses, as where, for example, the illegal income was in fact reported on the return. But this is probably little more than a theoretical possibility. The world being as it is, in the usual case it may be anticipated that the taxpayer will illegally fail to report his illegal income. Cf. Bittker, *Taxing Income From Unlawful Activities*, 25 Case-West. Res. L. Rev. 130, 139 (1974).

individual being investigated in connection with suspected nontax offenses, for, as we have already stated, once the prosecutor had inspected the return, any subsequent nontax prosecution would bear the onerous burden of proving that the government's case was free of taint. It can be anticipated that few prosecutors would voluntarily assume that burden. It would thus become infeasible to attempt to prosecute a taxpayer for both tax and nontax offenses in the same proceeding.[15]

The government has a "legitimate prosecutorial interest in using independently obtained evidence to enforce its [nontax] criminal laws unhindered by the burden of proving that it is not making use of information gathered pursuant to a nonprosecutorial regulatory scheme." Note, *supra*, 86 Harv. L. Rev. at 918. At the same time, the government also has an obvious and substantial interest in efficient administration of the income tax laws, including full and effective enforcement of their civil and criminal sanctions. Both these interests would be impaired by the rule of automatic use immunity for which petitioner and the minority in the court of appeals *en banc* contend, for that rule would halt the free flow of information between agencies that is necessary to efficient and vigorous enforcement of the law, even though the taxpayer has made no assertion of any privilege

[15] The problems discussed above could be significantly ameliorated if the immunity conferred upon disclosures contained in tax returns were limited to direct use of the returns as evidence and did not extend to derivative use. It is at least questionable, however, whether this Court's decisions in *Counselman* and *Kastigar* leave room for such an approach.

respecting the information he has uncomplainingly supplied.

The Fifth Amendment does not impose a rule of automatic use immunity in the circumstances of this case; it confers an immunity from use only with regard to disclosures made as a result of testimonial compulsion, which, as we have shown, is absent in connection with the simple act of filing a federal income tax return. We submit, therefore, that a taxpayer is not constitutionally entitled to use immunity merely by virtue of the filing of his federal income tax return. In order to preserve his Fifth Amendment privilege, a taxpayer must assert it at the time of filing his return as a reason for refusing to make any incriminating disclosures. The Internal Revenue Service could then determine whether the importance of the disclosures sought justified a limited grant of immunity. Special procedures could be followed with respect to those returns that contained information that had been elicited by a grant of immunity, in order to ensure that they would not taint any nontax prosecution. All other returns would remain, as now, available for all legitimate investigatory and prosecutorial purposes.[16]

B. IT IS DOUBTFUL WHETHER THE PRIVILEGE AGAINST SELF-INCRIMINATION MAY BE ASSERTED AS A BASIS FOR REFUSING TO ANSWER THE QUESTIONS ON A FEDERAL INCOME TAX RETURN

The arguments set forth in the preceding section were advanced in the context of an assumption that

[16] Congress may, of course, deem it advisable to impose further restrictions on access to and use of tax returns for nontax purposes, but the imposition of such restrictions is a matter appropriately left to legislative discretion; it is not constitutionally required.

petitioner's privilege against self-incrimination was implicated by the requirement that he answer the questions on his federal income tax return, *i.e.*, that he would have been entitled, at the times of filing those returns, to assert that privilege as a basis for refusing to make any incriminating disclosures. There need be no inquiry into the correctness of that assumption if the Court concurs with our principal contention, which is that a taxpayer's failure to assert any privilege at the time of filing subjects all the disclosures on his return to possible prosecutorial use. But before the Court could decide, to the contrary, that use immunity automatically attaches to the incriminating disclosures made on an income tax return without any claim of privilege, it would be necessary first to determine that a taxpayer's Fifth Amendment privilege is in fact implicated by the requirement that the return be fully completed and filed, for if the privilege is not implicated there is no constitutional basis for imposing use immunity. This Court's decision in *California* v. *Byers*, 402 U.S. 424, is significant in this context: it suggests that a taxpayer's privilege against self-incrimination may not be available as a basis for refusing to answer the questions on a federal income tax return.

Like *California* v. *Byers, supra*, this case raises the question whether the privilege against self-incrimination is implicated by a particular self-reporting scheme that is designed to serve a legitimate, nonprosecutorial governmental interest. The issue in *Byers* was whether the driver of an automobile involved in an accident

could constitutionally be compelled, in the absence of any grant of use immunity, to furnish his name and address and the fact of his involvement. This Court held that a driver could be compelled to comply with the California self-reporting requirements and that the information he furnished could be used against him in a subsequent criminal prosecution, *i.e.*, that the California "hit and run" statute did not implicate the privilege against self-incrimination.[17]

The plurality opinion in *Byers* determined that the disclosures required by the California statute "do not entail the kind of substantial risk of self-incrimination" (402 U.S. at 431) against which the privilege is directed.[18] In a concurring opinion, Mr. Justice Harlan reasoned that although such disclosures might in fact entail a substantial personal risk of self-incrimination in some circumstances, that consideration was outweighed by the significant nonprosecutorial interests that were furthered by the self-reporting scheme and by the importance of not impairing "the Government's capacity to utilize self-reporting schemes * * *

[17] The dissenters below incorrectly read *Byers* as not reaching the question "whether any of the information derived after the stop may be introduced at a criminal trial" (Pet. App. A, p. 36). The Supreme Court of California had upheld the statute's compulsory reporting requirement by recognizing such a restriction, which it considered an essential precondition to sustaining the statute's constitutionality. However, a majority of this Court expressly sustained the constitutionality of the California statute without a use restriction. See 402 U.S. at 427, 458.

[18] The plurality also determined that the information requested under the California statute was not testimonial and so was, in any event, outside the scope of the privilege. 402 U.S. at 431–434.

by the necessary presumption that evidence used in a prosecution after the individual discloses his relationship to the regulated transaction would not have been available if the individual had not complied with the statute" (402 U.S. at 443). As we now show, these lines of reasoning would support a conclusion that, at least in the circumstances of this case, the self-reporting requirements of the federal income tax laws, like those of the California "hit and run" statute, do not implicate the privilege against self-incrimination.

1. The text of the Fifth Amendment from which the privilege against self-incrimination is derived reads as follows:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

As the constitutional text suggests, the core of the privilege's applicability is in the criminal context, *i.e.*, custodial interrogation and testimony before grand juries and at trial. See, *e.g.*, *Bram* v. *United States*, 168 U.S. 532; *Counselman* v. *Hitchcock*, *supra*. The standard of incrimination necessary to implicate the privilege in the criminal context is whether the claimant's response "would furnish a link in the chain of evidence needed to prosecute the claimant for a * * * crime." *Hoffman* v. *United States* 341 U.S. 479, 486.

Before as well as after *Hoffman*, the standard of incrimination that it defined had been applied outside the criminal context as well. See, *e.g.*, *Quinn* v. *United States*, 349 U.S. 155 (testimony before legislative committees); *McCarthy* v. *Arndstein*, 266 U.S.

34 (testimony in civil proceedings); *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447 (testimony before regulatory agencies).

But the *Hoffman* standard is not invariably applicable in testing claims of privilege outside the criminal context. As one commentator on the *Byers* decision observed (Note, 85 Harv. L. Rev. 269, 271–272 (1971); footnotes omitted):

> Where the government's alleged nonprosecutorial interest [has] appeared legitimate and important, the Court [has] balked at applying the definition of "incriminating" developed in the criminal context by *Hoffman* v. *United States*, a definition under which the amendment's protections are triggered merely by the existence of "real" as opposed to purely "imaginary" risks of self-incrimination. Thus, in *United States* v. *Sullivan*, the Court rejected a criminal taxpayer's well-founded claim that even the simple filing of an income tax return was "incriminating" in that a completed return would evidence the amount of his criminal gains while a blank return would arouse official curiosity and investigation. And in *Shapiro* v. *United States*, where the Court was faced with a self-reporting scheme essential to a government attempt to control wartime inflation, it simply ignored the fact that the required disclosures were "incriminating" under the *Hoffman* standard and held the privilege inapplicable * * * [under] the "required records" doctrine * * *.

Thus the threshold level of incrimination required for invocation of the Fifth Amendment privilege does

not remain constant over the spectrum of the privilege's potential applicability: cases arising outside the criminal context, in which the requested disclosure will serve an important, nonprosecutorial governmental interest, are, in some circumstances, treated differently from cases arising within the criminal context. There is, of course, no constitutional anomaly in this disparity in the treatment of the two classes of cases. Cases arising within the criminal context are at the core of the area of protection promised by the constitutional text. As the particular facts giving rise to a claim of privilege become increasingly further removed from that area of protection, it becomes proper to accord increasing weight to the countervailing principles or policies that may be in competition with the principle underlying the privilege against self-incrimination. Cf. Grey, *Do We Have An Unwritten Constitution?* 27 Stan. L. Rev. 703 (1975).

We do not dispute that petitioner's answers on his income tax returns were "incriminating" under the *Hoffman* standard. For example, his admission that his occupation was that of a "professional gambler" furnished a link (albeit a weak one) in the chain of evidence needed to prosecute him for transmitting wagering information in violation of 18 U.S.C. 1084 (an offense the commission of which petitioner was acquitted). We question, however, whether the *Hoffman* standard is applicable here at all. The *Hoffman* standard permits invocation of the privilege upon the mere possibility of incrimination. But, as the plurality noted in *Byers,* "the mere possibility of incrimination

is insufficient to defeat the strong policies in favor of a disclosure called for by statutes [that further significant nonprosecutorial government interests]" (402 U.S. at 428).

2. The nonprosecutorial governmental interests of the federal income tax laws are manifestly more important than those furthered by the California "hit and run" statute at issue in *Byers.* This point is so obvious that it need not be belabored. An efficient revenue system is the staff of life for any modern government, and the income tax is the federal government's principal source of revenue.[19]

It is also self-evident that compelled self-reporting is a necessary part of any effective scheme for the determination of individual income tax liabilities. As this Court recently noted, "the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." *United States* v. *Bisceglia,* 420 U.S. 141, 145. Even merely sporadic refusals to disclose the information requested on federal income tax forms would impair the government's revenue collection; widespread refusals could lead to a breakdown of the taxing system.

In these circumstances, the government's need for information weighs heavily. It arguably outweighs the individual's interest, protected under the *Hoffman*

[19] In fiscal year 1974, the personal income tax accounted for 43.7 percent of all federal budget receipts, and the corporation income tax accounted for an additional 15.9 percent. Department of Commerce, *Statistical Abstract of the United States, 1974,* p. 221.

standard, of avoiding disclosures that create even a mere possibility of prosecution. To allow invocation of the privilege, on the basis of the comparatively permissive *Hoffman* standard, as a reason for refusing to answer standard questions posed on the federal income tax return, might create the risk of an intolerable interference with the government's interest in prompt and efficient tax collection.[20] These considerations point toward the conclusion that a claim of privilege with respect to a federal income tax return should be honored, if at all, only when the disclosures sought would entail a substantial risk of prosecution. Indeed, it seems clear from the plurality opinion in *Byers* that the income tax self-reporting requirement was one of the examples in mind when it recognized that some situations might justify utilization of a higher threshold of incrimination (402 U.S. at 427–428).

3. The disclosures requested from petitioner did not entail a substantial risk of prosecution. The ques-

[20] This view is consistent with *United States* v. *Sullivan*, *supra*, where this Court held that the possibility of incrimination did not justify a failure to complete a return. Mr. Justic Holmes, writing for the Court, suggested in *Sullivan* that the privilege against self-incrimination might in some circumstances justify a refusal to answer specific questions on a return (274 U.S. at 263):

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld.

The Court did not, however, express any view as to the standard of incrimination that would apply to such a claim of privilege. And see *California* v. *Byers*, *supra*, 402 U.S. at 434, n. 6.

tions with respect to which petitioner retrospectively asserted a claim of privilege at trial concerned only his occupation, his income, and the source of that income. Those questions were not designed to elicit incriminating admissions; they were neutral on their face and directed at the public at large; and they were designed to further the legitimate nonprosecutorial goals of securing and verifying the information necessary for an accurate determination of tax liability. Nor were petitioner's answers self-evidently incriminating. Neither his description of his occupation as that of a "professional gambler" nor his statement that he derived a substantial income from gambling constituted an admission of having engaged in unlawful activity. Various forms of gambling are lawful in many states, and nothing disclosed by petitioner on his return indicated that he had violated any state or federal law.

Accordingly, the privilege against self-incrimination arguably was not implicated by the questions petitioner was called upon to answer on his federal income tax returns. If this is the case, the disclosures that petitioner made could have been compelled without any accompanying grant of use immunity. *California* v. *Byers*, *supra*. A *fortiori* he would not be entitled to actual use immunity at a subsequent trial.

4. In suggesting this line of reasoning, we are not unmindful of the fact that in certain other circumstances involving questioning principally designed to further nonprosecutorial governmental interests, such as testimony in civil proceedings or before legislative

or regulatory bodies, the *Hoffman* standard of incrimination determines whether the privilege may be invoked. See p. 30, *supra*. But there are important differences between inquiries that are directed to a specific individual in a public forum and neutral questions that are addressed to the public at large as part of a vast, national self-reporting scheme. A question formally addressed to a specific individual in a public forum is asked in a context that highlights any incriminating implications of the response and therefore enhances the risk of criminal investigation. In that context, an answer that meets the *Hoffman* standard of incrimination perhaps can fairly be said to entail a significant probability of prosecution. The same cannot be said of answers to neutral questions on a self-reporting form that must be completed by all taxpayers. Those answers, which are furnished "in the quiet of one's home" (Pet. App. A, p. 7), are not accessible to the public. See Section 301.6103(a) of the Treasury Regulations on Procedure and Administration, 26 C.F.R. 301.6103(a). They therefore escape the public scrutiny to which statements made in less private settings are subjected. Moreover, official scrutiny of the disclosures on income tax returns will, in all but unusual cases, focus solely upon revenue implications, with little or no consideration likely to be given to any possibly incriminating implications of answers that do not suggest criminality on their face.

In short, the individual's real interest in avoiding the necessity of giving a possibly incriminating response is considerably weaker where the question has been addressed to him merely in his capacity as a member of a large class of individuals who are subject to neutral self-reporting requirements than where he has been singled out to answer it and must do so in a public forum. In the former context, the government's substantial interest in enforcing such self-reporting requirements without the interference, delay, or outright obstruction that might be occasioned by the easy availability of claims of privilege could reasonably be held paramount.

5. It should be clear that nothing we say here is inconsistent with this Court's *Albertson-Marchetti* line of cases.[21] In those cases, the Court held that the privilege against self-incrimination could be invoked as a reason for refusing to comply with governmental registration requirements directed at Communist Party members, gamblers, and owners of illegal firearms. In so holding, the Court explicitly distinguished such registration requirements from the reporting requirements that the income tax laws impose generally upon all taxpayers. In *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79, the Court noted:

> In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not

[21] *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70; *Marchetti* v. *United States*, *supra; Grosso* v. *United States*, *supra; Haynes* v. *United States*, 390 U.S. 85.

> asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.

Similarly, in *Haynes* v. *United States, supra,* 390 U.S. at 98–99, the Court observed:

> * * * [T]hese [firearms registration] provisions, as now written, cannot be brought within any of the situations in which the Court has held that the constitutional privilege does not prevent the use by the United States of information obtained in connection with regulatory programs of general application. See *United States* v. *Sullivan*, 274 U.S. 259; *Shapiro* v. *United States,* 335 U.S. 1. * * * The questions propounded by [the firearms registration statute], like those at issue in *Albertson* * * *, are "directed at a highly selective group inherently suspect of criminal activities"; they concern, not "an essentially non-criminal and regulatory area of inquiry," but "an area permeated with criminal statutes."

See also *Marchetti* v. *United States, supra,* 390 U.S. at 47–49.

The Court's evident concern with the registration and excise tax requirements in the *Albertson-Marchetti* cases was that the disclosures they required would entail a substantial risk of prosecution. As the Court stated in *Grosso* v. *United States, supra,* 390 U.S. at 67, "unlike the income tax return at issue in *United States* v. *Sullivan,* 274 U.S. 259, petitioner's

> submission of [a wagering] excise tax payment, and his replies to the questions on the attendant return, would directly and unavoidably have served to incriminate him." Replies to the neutral questions on a federal income tax return do not subject the taxpayer to the analogous risk of prosecution; at least except where such replies themselves constitute a direct admission of criminality [22]—a situation not presented by the facts of this case—they do not have "the direct and unmistakable consequence of incriminating * * *." *Marchetti* v. *United States, supra,* 390 U.S. at 49.

It is true that petitioner's disclosure that his occupation was that of a "professional gambler" revealed that his livelihood was gained in an area "permeated with criminal statutes." But this disclosure did not entail a substantial risk of prosecution "in the setting in which [the question was] asked * * *." *Hoffman* v. *United States, supra,* 341 U.S. at 486. The self-reporting requirements of the income tax statutes are directed at the public at large, rather than at "a highly selective group inherently suspect of criminal activities," are imposed exclusively for legitimate revenue-raising purposes, and are not designed to serve secondary prosecutorial purposes.

[22] The only questions on a federal income tax return that would appear to have a substantial potential for eliciting a direct admission of criminality are the ones that request the taxpayer to state his occupation and the source of miscellaneous income. The evident purpose of those questions is nonprosecutorial, *i.e.*, to secure information that will assist in verifying the correctness of the amount of income reported.

Although the income tax laws, like "the California Vehicle Code[,] defines some criminal offenses, [those laws are] essentially regulatory, not criminal." *California* v. *Byers, supra,* 402 U.S. at 430. By contrast, the registration requirements at issue in the *Albertson-Marchetti* cases self-evidently served a significant, if secondary, prosecutorial purpose. It could be anticipated that the disclosures sought by those requirements would be scrutinized for incriminating admissions. See, *e.g., Marchetti* v. *United States, supra,* 390 U.S. at 47. Thus any such disclosure, even if it involved only the mere possibility of incrimination, entailed a significant risk of criminal investigation and prosecution. The same is not true of disclosures on income tax returns, which are ordinarily reviewed exclusively for their bearing upon the amount of income tax due from the taxpayer.

In short, disclosures such as petitioner's, unlike those that had been sought in the *Albertson-Marchetti* cases, would not be likely to give rise to any criminal inquiry or subsequent prosecution. Indeed, the risk of prosecution entailed by petitioner's disclosures would appear to be significantly less than that entailed in compliance by motorists with the "hit and run" statute in *Byers*. That statute applied only to drivers involved in automobile accidents causing property damage, and such drivers are "in fact very likely to have violated one of the hundreds of state criminal statutes regulating automobiles * * *." 402 U.S. at 460 (dissenting opinion of Mr. Justice Black). In contrast, the self-reporting requirements at issue here applied generally to all taxpayers, without any implicit discrimination on the basis of possible involvement in criminal activity.[23]

[23] It is unclear to what extent the result reached in *Byers* depended not only upon the importance of the non-prosecutorial purpose underlying the self-reporting requirements and the nature and size of the class of persons to which the requirement applied, but also upon the damage to governmental interests that would ensue from immunization of the reports from prosecutive use. It appears that the latter factor was accorded considerable weight by Mr. Justice Harlan, who emphasized that a decision unfavorable to the State on either ground—*i.e.*, striking down the reporting requirement or clothing all reports made thereunder with immunity—would seriously impair important public interests (402 U.S. at 443). The State would, by the very nature of the problem it confronted, be forced either to forego the reporting system, with the benefits it could be expected to yield in furthering highway safety and securing fair compensation for accident victims, or to accept a crippling blow to its ability to use criminal prosecutions as a means of enforcing vehicular safety codes, because of the severe difficulties likely to be present in establishing that any prosecution was entirely free of taint derived from the defendant's report of an accident.

If there is to be a principled distinction between *Byers* and the self-reporting requirements of the federal income tax, it must, it seems to us, be predicated upon a judgment that allowance of some form of immunity would not significantly impair the availability of criminal sanctions as a means for enforcing the important societal norms reflected in the federal criminal laws. This was, as a practical matter, impossible in the context of the California statute at issue in *Byers*, since there was no way that a person involved in a reportable accident could assert the privilege without by that very act incurring a significantly enhanced risk of prosecution. An assertion of the privilege by a taxpayer on his return is more feasible; it might accordingly be concluded that a recognition of the privilege in connection with the filing of income tax returns (subject to a power to

Footnote continued on page 42.

II

ANY ERROR IN THE ADMISSION INTO EVIDENCE OF PETITIONER'S FEDERAL INCOME TAX RETURNS WAS HARMLESS

Petitioner was indicted and tried before the jury on two separate counts. The first of these counts charged petitioner's participation in a conspiracy to violate federal gambling laws, in violation of 18 U.S.C. 371. As Judge Wallace noted in his dissent from the original panel decision below, "[t]he gist of the government's evidence and argument was that co-conspirators Lawler and Swank were elaborately betting on selected horses on the basis of information supplied by [petitioner]" (Br. in Opp. App., p. 19).

The second count charged petitioner with the substantive offense of aiding and abetting the unlawful interstate transmission of bets or wagers, in violation of 18 U.S.C. 1084. "[B]eing engaged in the business of betting or wagering" (C.R. 46) is an element of that offense. Petitioner's income tax returns, which indicated that he was a "professional gambler" who received substantial amounts of income from "wagering" or "gambling," apparently were introduced for

Footnote continued from page 41.
compel the information by a grant of immunity, *e.g.*, under 18 U.S.C. 6004) would not be so destructive of important governmental objectives as to override the interests served by allowing a claim of the privilege to be governed by the *Hoffman* standard. Such a conclusion would, of course, be viable only if the Court were to hold with the court of appeals' majority that an express claim of privilege on the return is required to preclude subsequent prosecutorial use of information set forth in the return. See pp. 12–27, *supra*.

the bearing they would have on that element of the offense proscribed by 18 U.S.C. 1084.

At the close of the government's case, the trial court acquitted petitioner of the substantive offense. Thus the tax returns were considered by the jury only with respect to the charge of conspiracy. The returns covered a period (1965–1967) prior to the first overt act of the conspiracy, which was alleged to have occurred on or about May 23, 1968 (C.R. 42). Accordingly, in his closing argument, the prosecutor referred to the returns only as evidence that petitioner was "no stranger to the business of wagering and gambling" (App. 58–59). That use of petitioner's income tax returns "was harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18, 24.

First, it is clear, as Judge Wallace pointed out in his opinion dissenting from the panel decision, that petitioner's "gambling tendencies were irrelevant to his part in this particular conspiracy" (Br. in Opp. App., p. 19). The accusation was not that petitioner himself placed bets in furtherance of the conspiracy, but rather that he supplied his co-conspirators with the information necessary to facilitate their wagering activities (*ibid.*). Proof of petitioner's role in the conspiracy was based in large part upon telephone toll records, which revealed a pattern of telephone communications between petitioner and his co-conspirators immediately in advance of each race on which they placed heavy wagers in furtherance of the conspiracy. See, *e.g.,* Tr. 130–131, 1026–1029, 1034

588-588—75——7

(Mister Fourway); 535–536, 548, 1035 (Deerwood Duke); 672–673, 891 (Maretazo II); 168, 895–896 (King Kildare).[24] In addition, the government introduced evidence of co-conspirator Swank's pretrial statement to investigating F.B.I. agents that petitioner was "the best handicapper around the race track and if [petitioner] said he liked a horse, just him saying this [was] enough for Swank to lay several thousand dollars on [the] horse" (Tr. 997). The government also presented evidence that petitioner had received a $1500 payoff from co-conspirator Lawler (Tr. 125–126). It was this evidence—and not the fact, revealed by petitioner's income tax returns, that he was "no stranger to * * * gambling"—that was probative on the issue of guilt on the conspiracy count and must be presumed to have been determinative in the minds of the jurors.

Second, even if petitioner's gambling tendencies had been probative on the issue of guilt, those tendencies were amply established by testimony that, for example, petitioner had placed many personal bets on

[24] "Tr." refers to the eight-volume transcript of trial proceedings. "Mister Fourway", "Deerwood Duke," "Maretazo II," and "King Kildare" were horses on which petitioner's co-conspirators placed or attempted to place wagers after receiving information from petitioner that certain races had been fixed. Other evidence relating to those races is set forth at Tr. 241–242, 289–291, 396–398, 572–574, 709–711, 714, 716, 1019–1023, 1025–1028, 1167–1169 (Mister Fourway); 128–129, 131, 141, 143–A, 144, 148, 155–159, 274, 291–292, 399, 450, 454, 470, 473–479, 497–499, 535–536, 545–550, 723–724, 1029, 1032–1034, 1041, 1044, 1051–1053, 1078, 1184, 1304–1305, 1325 (Deerwood Duke); 162–165, 292–293, 354–356, 491, 493–494, 556, 672–673, 889–891 (Maretazo II); 131, 168–169, 293–294, 892–893, 896 (King Kildare).

horse races (Tr. 122–126) and that he was an excellent handicapper who went to horse races frequently (Tr. 565, 655, 1092). That evidence obviously was more directly related to the kind of gambling involved in this case, *i.e.*, wagering on horse races, than were the more general statements on petitioner's income tax returns. Those returns were, at most, merely cumulative evidence of petitioner's interest in the sporting life.

Accordingly, whether or not this was a "close" case, it is virtually inconceivable that the jury's verdict would have been altered by exclusion of petitioner's tax returns. The harmless error doctrine thus fully justifies affirmance of petitioner's conviction, even if the introduction in evidence of the returns was error of constitutional magnitude.

III

THE OTHER EVIDENCE INTRODUCED AGAINST PETITIONER WAS PROPERLY ADMITTED

Petitioner contends that the telephone toll records were admitted into evidence at trial in violation of Section 605 of the Communications Act of 1934, 47 U.S.C. 605 (Br. 10–21), and that certain racing charts introduced in evidence were not admissible under the Business Records Act, 28 U.S.C. 1732 (Br. 21–24).[25] Neither contention has merit.

[25] The original panel dismissed these and other contentions with the observation that "[n]one of [petitioner's] remaining contentions has merit or is of sufficient substance to warrant discussion" (Br. in Opp. App., p. 18), and they were not further considered by the court of appeals *en banc*. In view of this

Footnote continued on page 46.

A. THE ADMISSION INTO EVIDENCE OF THE TELEPHONE TOLL RECORDS DID NOT VIOLATE SECTION 605 OF THE COMMUNICATIONS ACT

Petitioner invites the Court to decide whether the general language of Section 605 of the Communications Act bars a telephone company from divulging telephone toll records that it keeps in the ordinary course of business for billing and excise tax purposes. The Court need not reach that issue, however, for the divulgence here falls within the statute's specific exception permitting divulgence of communications "in response to a subpoena issued by a court of competent jurisdiction, or * * * on demand of other lawful authority." It is undisputed that the telephone toll records in this case were produced by the telephone company pursuant to a valid grand jury subpoena (App. 34–35; C.R. 202–203, 205).[26] That subpoena satisfied the statutory exception. It need not be decided here whether the subpoena was "a subpoena issued by a court of competent jurisdiction" or, instead, constituted the "demand of other lawful authority." It was clearly one or the other. Technically, the subpoena was "issued by the clerk under the seal of the court." Rule 17(a), Fed. R. Crim. P. This Court noted in *Brown* v. *United States,* 359 U.S. 41, 49:

> [A] grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony * * *.

Footnote continued from page 45.

fact, this Court may wish to exercise its discretion to deny review of these contentions. Cf. *Mishkin* v. *New York*, 383 U.S. 502, 512–514.

[26] Unlike *United States* v. *Miller*, No. 74–1179, certiorari granted, June 9, 1975, this case does not present any question concerning the validity of the subpoena.

See also *United States* v. *Stevens,* 510 F. 2d 1101 (C.A. 5). But whether the subpoena here is characterized as having been issued by the court, or by the clerk or the grand jury as an "other lawful authority," the divulgence of the telephone toll records here was permitted by the express terms of Section 605.

Section 605 should not, in any event, be read as barring divulgence of telephone toll records. The telephone company is required by statute to retain such records for federal excise tax purposes (47 U.S.C. 220), and such records necessarily are also kept in the ordinary course of business for billing purposes. Petitioner's strict reading of Section 605 would bar telephone companies from divulging the toll record, in the form of a bill, to subscribers (because, in many instances, the subscriber would not be within any of the excepted categories of individuals to whom divulgence may be made) and, arguably, from divulging them in connection with the collection and payment over of the excise tax. These results obviously were not intended by Congress. As the Second Circuit reasoned in *United States* v. *Covello,* 410 F. 2d 536, 541–542, certiorari denied, 396 U.S. 879:

> Defendant argues that the divulgence of the toll slips was a prohibited disclosure by the corporate person of the existence of a commu-

nication within the meaning of § 605. We disagree. * * * Section 605 "must be interpreted in the light of reason and common understanding to reach the results intended by the legislature." *Rathbun* v. *United States,* 355 U.S. 107 * * *.

* * * [T]he keeping of toll records is a necessary part of the ordinary course of the telephone company's business and is necessary in order that the company may substantiate its charges to its customers. Toll records are kept for all telephone subscribers and are not kept just for subscribers being investigated by officers of the law, or ones suspected of criminal proclivities. The subscriber is fully aware that such records will be made * * *, and the records of the telephone company so kept in the ordinary course of the company's business are entitled to the same evidentiary treatment as the records of other businesses. See Federal Business Records Act, 28 U.S.C. § 1732 (1964). Section 605 was not designed to render evidentially inadmissible the records made in the ordinary course of the telephone company's business and which are essential to the ordinary operation of that business.[27]

[27] None of the court of appeals' decisions upon which petitioner relies is to the contrary. Indeed, those decisions go further and hold that wire interceptions effected by the telephone company may be divulged when necessary to protect the company against fraud. See *Bubis* v. *United States*, 384 F. 2d 643 (C.A. 9). Although this case does not involve fraudulent use of the telephone, neither does it involve wire interceptions. See, *e.g.*, *United States* v. *Gallo*, 123 F. 2d 229, 231 (C.A. 2); *Brandon* v. *United States*, 382 F. 2d 607, 610–611 (C.A. 10); *Di Piazza* v. *United States*, 415 F. 2d 99, 102 (C.A. 6); *Nolan* v. *United States*, 423 F. 2d 1031, 1044 (C.A. 10). The only issue here concerns the treatment of business records, not of wire interceptions, and that issue was, we submit, correctly decided by the court below and the Second Circuit in *Covello.*

B. RACING CHARTS OF THE CALIFORNIA HORSE RACING BOARD WERE PROPERLY ADMITTED UNDER THE BUSINESS RECORDS ACT

Racing charts kept by the California Horse Racing Board, an agency of the State of California, were offered by the government to establish the dates of, and other facts about, certain horse races on which co-conspirators Lawler and Swank had placed bets. Petitioner's objection that the charts were not admissible under the Business Records Act was overruled, and the charts were admitted into evidence.

The charts were admissible under the Act, which makes admissible "any writing or record * * * made as a memorandum or record of any act, transaction, occurrence, or event * * * if made in regular course of any business * * *." 28 U.S.C. 1732(a). The gravamen of petitioner's objection was that the charts had been compiled in the first instance by Triangle Publications, the private publishers of the "Daily Racing Form," rather than by the Board. But that fact does not render the charts inadmissible under the Act. The Board's chief investigator testified that the Board, as authorized by statute, had promulgated a rule or order authorizing Triangle Publications to compile the Board's official chart book and that the charts were kept by the Board in the normal course of its business (Tr. 237–238, 248–249, 251–252, 257–262; App. 36–39, 43–47). In other words, the charts were made on behalf of the Board by Triangle Publica-

tions as its agent. At least in the absence of any showing of unreliability, it is irrelevant under the Act whether the entrant of the records was an employee of the business or, as here, an employee of the business's agent.[28] And petitioner offered no evidence that the Board's charts were unreliable.

At the time of the admission of the charts into evidence, petitioner noted that his objection "also includes the objection to the business records exception to the hearsay rule, if that is the basis upon which these are admitted, which is a denial of confrontation of witnesses" (Tr. 264; App. 48–49). But this Court has specifically rejected the argument "that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced." *Dutton* v. *Evans,* 400 U.S. 74, 80 (plurality opinion of Mr. Justice Stewart); and see *id.* at 94 (concurring opinion of Mr. Justice Harlan). Accordingly, the district court correctly rejected petitioner's frontal attack on the constitutionality of the Business Records Act as applied in criminal cases. See, *e.g., United States* v. *Haili,* 443 F. 2d 1295 (C.A. 9); *Hanley* v. *United States,* 416 F. 2d 1160 (C.A. 5), certiorari denied, 397 U.S. 910. See

[28] Insofar as petitioner's argument rests upon the fact that the entries on the charts lay outside the personal knowledge of any member or employee of the Board, it is refuted by the plain language of the Act (28 U.S.C. 1732(a)):

> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

It is, moreover, undisputed that the entries on the charts lay within the personal knowledge of Triangle Publications' employees (Tr. 255–257; App. 41–43).

generally V Wigmore, *Evidence* § 1397 (Chadbourn rev. 1974)."[29]

CONCLUSION

The judgment of the court of appeals *en banc* should be affirmed.

Respectfully submitted.

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JULY 1975.

[29] The foundational requirements for introducing the charts under the Act, in the context of this criminal prosecution, might have been more appropriately met by offering the testimony of the Triangle Publications' employee, or employees, who actually made the relevant entries. But petitioner's general objection to the Business Records Act was not sufficiently specific to call this point to the attention of the district court, at a time when any foundational deficiency could have been easily cured. In view of this fact, we believe that the court did not err in admitting the charts. Moreover, it remained open to petitioner to offer the testimony of Triangle Publications' employees in an attempt to show that the charts were unreliable and therefore inadmissible under the Act (Tr. 262–263; App. 47–48). There was, in fact, no serious dispute concerning the accuracy of the charts. Accordingly, petitioner was not substantially prejudiced by their admission upon the testimony of the Board's chief investigator.

U.S. GOVERNMENT PRINTING OFFICE: 1975